THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0733, Beulah White v. Linda M. White & a., the court on December 2, 2005, issued the following order:

The petitioner, Beulah White, appeals the trial court's order enforcing the settlement agreement between her and the respondents, Linda M. White and Rodney White, Jr., in a partition action concerning land the parties own jointly in Ossipee. We affirm, but remand for further proceedings.

"An action for partition calls upon the court to exercise its equity powers and consider the special circumstances of the case, in order to achieve complete justice." DeLucca v. DeLucca, 152 N.H. 100, 102 (2005). "With that in mind, we will not disturb the probate court's decree unless it is unsupported by the evidence or plainly erroneous as a matter of law." Id.; see RSA 567-A:4 (1997). We review the record of the probate court proceedings to determine if the court's findings could be reasonably made, keeping in mind that as the trier of fact, the trial court was in the best position to measure the persuasiveness and credibility of evidence. DeLucca, 152 N.H. at 102.

The petitioner argues that the trial court erroneously ordered specific performance of the parties' settlement agreement, as it pertained to Lot 10, because the agreement was insufficiently definite to be enforced. The trial court found that the settlement agreement contemplates a sale of Lot 10 with the parties splitting the proceeds. The petitioner asserts that, because determining the boundaries of Lot 10 required a surveyor and the only surveyor who testified at the hearing testified that he could not determine the location of Lot 10 with reasonable certainty, the trial court could not enforce the parties' agreement regarding Lot 10.

We first address whether the parties' settlement agreement was sufficiently definite to be enforced through specific performance. "While it is true that contracts, both oral and written must be definite in order to be enforceable, the standard of definiteness is one of reasonable certainty and not 'pristine preciseness.'" Sawin v. Carr, 114 N.H. 462, 465 (1974). The requirement that a contract be reasonably certain "is fulfilled if the meaning of the contract as a whole, is intelligible to the court." Jesseman v. Aurelio, 106 N.H. 529, 532 (1965) (quotation omitted).

A contract to sell land is reasonably certain "[i]f the descriptive language used is clear and explicit in denoting a particular lot of land." Id. (quotation

omitted). "[I]t is not essential that [the contract] should contain a statement of [the land's] geographical location or other designations frequently used in formal conveyances of real estate." Id. (quotation omitted). As the court has observed, "the difficulty regarding uncertainty has probably been over-emphasized and should not be allowed to hamper equitable relief further than necessity requires." Id. at 533 (quotations omitted).

Actually, the agreement at issue here was not a contract to sell land. It was an agreement to sell Lot 10 expressly conditioned upon there being a future agreement between the buyer and the petitioner. The agreement was in settlement of the petitioner's partition action in which the parties agreed that if it was "acceptable" to the buyer, Chocorua Forest Lands, and if the petitioner and buyer agreed upon the location of a boundary between Lots 10 and 11, the petitioner would sell Lot 10 to the buyer for $75,000. In this context, the reference to Lot 10 as "Ossipee Tax Map 3, Lot 10" was sufficient.

We next address whether the trial court was required to rely upon expert testimony to determine the boundaries of Lot 10. Expert testimony is necessary whenever the matter to be determined is so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layperson. Silva v. Warden, N.H. State Prison, 150 N.H. 372, 374 (2003). Where conduct is alleged in a context that is within the realm of common knowledge and everyday experience, the plaintiff is not required to adduce expert testimony. Id. In the context of a partition action where the court is exercising its equitable authority to divide property, we conclude that no such expert testimony is necessary.

Contrary to the petitioner's assertions, even though her expert was the only expert who testified, the trial court was not bound to accept this testimony. As the trier of fact, the probate court is not compelled to believe even uncontroverted evidence. DeLucca, 152 N.H. at 102. It was within the probate court's "discretion to resolve conflicts in the evidence." Id. (quotation omitted). In so doing, the "court could accept or reject such portions of the evidence presented as [it] felt proper, including that of expert witnesses." Id. (quotation omitted).

The petitioner next asserts that there was insufficient evidence to support the trial court's determination of the boundaries of Lot 10. The determination of the location of a boundary is a question of fact, which we will not disturb on appeal if there is evidence to support it. Brown v. Rines, 123 N.H. 489, 493 (1983). Our review of the record indicates that there was evidence to support the trial court's decision. See Groth v. Johnson's Dairy Farm, Inc., 124 N.H. 286, 290 (1983). Consequently, we uphold it. See id.

The petitioner next contends that the trial court erroneously found that she impliedly agreed to using the Ossipee tax maps to ascertain Lot 10's

boundaries. Having reviewed the record on appeal, we conclude that the probate court could reasonably have made this finding.

The petitioner next asserts that the trial court erroneously opined that she "was somehow at fault or was allocated the risk of the lack of existence of Lot 10." Because we view the language the petitioner challenges as dicta, we decline to address her argument.

As noted above, the settlement agreement provides for the sale of Lot 10 subject to the petitioner's agreement on the location of the boundary between Lot 10 and Lot 11. The settlement agreement is silent, however, as to the disposition of Lot 10 absent an agreement on the location of the boundary. To the extent that the trial court ordered specific performance of this provision, which requires the petitioner's agreement to the boundary location prior to any sale, we affirm its ruling. Both parties, however, appear to understand the trial court's order as requiring the petitioner to sell Lot 10 unconditionally. Moreover, it appears from the record before us that the petitioner is unlikely to agree to the location of the boundary, and thus enforcement of the settlement agreement is unlikely to result in the contemplated sale of Lot 10, leaving unresolved the partition petition with respect to that lot. Accordingly, we remand to the trial court to determine whether the petitioner will agree to the sale of Lot 10 in accordance with the terms of the settlement agreement. If she does not agree, then the court shall determine the appropriate partition or disposition of Lot 10, keeping in mind our holding in DeLucca that a sale of the lot may be ordered only upon the making of an express finding that "the property is so situated or is of such a nature that it cannot be divided so as to give each owner his or her share or interest without great prejudice or inconvenience." DeLucca, 152 N.H. at 104-05.

Affirmed and remanded.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Eileen Fox,
Clerk